SUPREME COURT. U. S.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 889

SIMON JACKSON,
Petitioner,

vs.

ALLEN INDUSTRIES, INC., a Delaware Corporation,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATUTE AND ORDER INVOLVED

The statute involved is Section 22 of Title 5 of the United States Code which reads as follows:

> "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for

> the Government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it."

Department of Justice Executive Order No. 3229, Revised, as cited by Petitioner in his petition for Writ of Certiorari and as set forth in Petitioner's Appendix, is also involved.

QUESTION PRESENTED

Respondent submits that there is only one question presented by the petition for Writ of Certiorari, namely, "Is a subordinate employee of the Department of Justice subject to a citation for contempt of court when, in reliance upon an Executive Order promulgated by the Attorney General of the United States, he, in a civil suit between private litigants, as instructed by the Attorney General, refuses to produce records of the Federal Bureau of Investigation ordered produced under subpoena *duces tecum*."

Petitioner in his brief filed with the Sixth Circuit Court of Appeals actually encompassed the three questions which he now urges in his petition for Writ of Certiorari in the single question, "Did the court err in refusing to compel obedience to the subpoena served in behalf of plaintiff on witness Brown, special agent in charge, Federal Bureau of Investigation, at Detroit?"

STATEMENT

(Figures in parentheses followed by the letter "a" refer to pages of Appellant's (Petitioner's) Appendix; figures followed by the letters "AC" refer to pages of Amicus Curiae Appendix; figures followed by the letter "b" refer to pages of Appellee's (Respondent's) Appendix, all as filed with the United States Sixth Circuit Court of Appeals and filed with the Supreme Court as the Record pursuant to Rule 21(1).)

Witness Charles W. Brown, special agent in charge of the FBI at Detroit, Michigan, was first served on behalf of Petitioner by subpoena *duces tecum* on or about October 25, 1955, seeking production of FBI records (1 and 2 AC). A Motion to Quash that subpoena was filed on behalf of witness Brown by the United States Attorney (4 and 6 AC). At the hearing on said motion, a letter directed to the United States Attorney was read into the Record (6 and 7 AC). The District Judge entered an order quashing the subpoena (7 and 8 AC). An application by Petitioner to the Six Circuit Court of Appeals for a Writ of Mandamus, for the purpose of reviewing that order by the District Court, was denied by order of the Sixth Circuit Court of Appeals in its case No. 12809 (8 and 9 AC).

Subsequently, witness Brown was again served with a subpoena *duces tecum* (2 and 3 AC). A Motion to Quash that subpoena was again filed on his behalf by the United States Attorney (16a). Brown communicated the contents of the subpoena to the Department of Justice and was instructed, on authority of Executive Order 3229, to refuse to produce the records called for by the subpoena (30a, *et seq.*) Brown appeared at the trial before the District Court, was sworn as a witness, and, with due respect, informed the Court of his instructions (40a, *et seq.*). The Court declined to hold witness Brown in contempt (57a-60a).

ARGUMENT

The question, if there be one, presented by the Record in this case, is a narrow one. Respondent respectfully submits that it is controlled by

> *U. S. ex rel. Touhy v. Ragen,* 340 U. S. 462 and *Boske v. Comingore,* 177 U. S. 459.

The relevant facts in the case presented by the petition for Writ of Certiorari are such as to be substantially indistinguishable from those present in *Touhy v. Ragen, supra,* where this Court said:

> "We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate, Mr. McSwain, acted in accordance with the Attorney General's instructions and a department order. But we limit our examination to what this record shows, to-wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from making such submission by his superior through Order No. 3229. The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release Department papers. Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States or with the right of the custodian of government papers to refuse to produce them on the ground that they are

state secrets or that they would disclose the names of informants.

"We think that Order No. 3229 is valid and that Mr. McSwain in this case properly refused to produce these papers. * * *"

Petitioner apparently premises his petition for Writ of Certiorari on the grounds that one of two cases, or perhaps both, have either overruled or modified this Court's decision in *Touhy v. Ragen, supra.* Those decisions, as cited by Petitioner, are

U. S. v. Reynolds, 345 U. S. 1 and
Roviaro v. U. S., 353 U. S. 53.

It is respectfully submitted that any such contention is obviously fallacious.

The *Reynolds* case concerned a suit under the Tort Claims Act to which the United States was a party defendant. No subordinate official of the United States was served with a subpoena *duces tecum* or refused to produce documents pursuant to such subpoena. Rather, the case involved a motion for discovery directed to the United States, as a party to the action, under Rule 34 of the Federal Rules of Civil Procedure and the action taken by the District Court upon the Government's failure to produce the documents in question was pursuant to Rule 37(b)(2)(i). *Touhy v. Ragen, supra,* was cited by this Court in the *Reynolds* case in support of this Court's decision to dispose of the case upon narrower grounds than the broad propositions urged upon it for decision. There was no suggestion that the Court in any way considered *Touhy v. Ragen* as modified by the *Reynolds* case or, in fact, as applicable to the facts presented by that case.

Roviaro v. U. S., supra, was a criminal case involving a violation by defendant Roviaro of the narcotics laws.

It falls within the class of cases (all criminal cases) which hold, generally, that the Government may invoke "evidentiary privileges" only at the expense of letting the defendant go free, upon the basic principle that the Government, being the prosecutor of the criminal on the one hand and under a duty to see that justice is done on the other, should not undertake prosecution and then invoke governmental privileges which might deprive the accused of any matter relevant to his defense.

It should be obvious that both *Reynolds* and *Roviaro* are not in point as regards the facts of this case. This is a civil suit between private litigants. The subpoena *duces tecum* was not served upon or directed to the Attorney General but rather to "Charles W. Brown; Special Agent in Charge, Federal Bureau of Investigation." Brown communicated with the Attorney General, received his instructions, and followed them. So this case is simply one of a subordinate of the Attorney General obeying the lawful orders of the Attorney General. It is respectfully submitted that, under such circumstances, the District Court quite correctly refused to hold witness Brown in contempt upon his failure to produce certain records of the FBI called for by the subpoena *duces tecum*.

In summary, therefore, comment may be in order concerning the questions involved, as proposed by Petitioner in his petition for Writ of Certiorari:

> (a) The first question as proposed by Petitioner was never before the District Court and is not before this Court. As in *Touhy v. Ragen, supra*, we are not here "concerned * * * with the right of the custodian of government papers to refuse to produce them on the ground * * * that they would disclose the names of informants."

(b) The second question as proposed by Petitioner was likewise never before the District Court and is likewise not before this Court. The United States is not a party to the action. The Attorney General was never before the Court. The "privilege" afforded the witness by Order No. 3229 was not only claimed by the witness under oath on the witness stand but also on the witness' behalf in the Motions to Quash filed by the United States District Attorney.

(c) The third question proposed by Petitioner is likewise not before this Court. The Attorney General was never subpoenaed. No effort was made, in spite of the plain meaning expressed in the majority opinion and concurring (not dissenting) opinion of this Court in *Touhy v. Ragen, supra,* to secure production of the documents desired through service upon the Attorney General himself. Entirely apart from questions which might conceivably be raised should the Attorney General have arbitrarily failed to produce documents of the FBI after service upon him of proper judicial process calling for their production, how can there be a denial of "due process of law" when available process of law has not been utilized by Petitioner?

Although Respondent respectfully submits that this petition for Writ of Certiorari should be denied on the basis of the foregoing alone, it may, nevertheless, be appropriate to point out in brief summary that wholly aside from the "FBI file" issue, Petitioner failed to make out a case of interference with employment, which failure is readily apparent from the whole Record and is reflected in both the opinion of the District Court and the opinion of the Sixth Circuit Court of Appeals.

The tort of interference with employment is one of the so-called "intentional torts" and the District Court found no such intent on the part of Respondent. Furthermore, even if this were not the case the whole Record affirmatively establishes Respondent's justification or privilege. Furthermore, under the laws of the State of Michigan there must be express corporate authority or ratification shown to make words of corporate employees, defamatory in nature, actionable. See

Flaherty v. Maxwell Motor Co., 187 Mich. 62 (1915);

Robertson v. New York Life Insurance Co., 312 Mich. 92 (1945).

The Record is completely devoid of any showing of such atuhorization by Respondent to its employees who allegedly made the statements in question. Finally, there is no showing in the Record that the suspension of Petitioner through the Loyalty Board was caused by any report made to the Loyalty Board by the FBI or based on any report received by the FBI from Respondent or its employees. In all essential elements of the action, there was a failure of proof by Petitioner.

CONCLUSION

For the foregoing reasons its is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

HOWARD M. LUBBERS,
Of Freud, Markus, Lubbers & Slavin,
Counsel for Respondent.

Detroit, Michigan,
May, 1958.